(10)

No. 10-537

In the Supreme Court of the United States

OSAGE NATION, PETITIONER

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Osage Nation retains a reservation in Osage County, Oklahoma, such that the State may not assess personal income taxes against Osage members who live on fee land and earn income within the original reservation boundaries.

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This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. In 1872, Congress set aside approximately a million and a half acres of what subsequently became the Oklahoma Territory as a reservation for the Osage Tribe of Indians, who had purchased that land following the sale of other tribal lands. Act of June 5, 1872, ch. 310, 17 Stat. 228; see *McCurdy* v. *United States*, 246 U.S. 263, 265 (1918). The area turned out to be rich with deposits of oil, natural gas, coal, and other minerals. *Ibid.* By the early 1900s, the Tribe's annual income

from leasing surface and mineral rights, plus interest from an $8 million trust fund, was nearly $1 million. *Ibid.*

b. In June 1906, Congress passed two laws addressing the status of lands in the Oklahoma Territory and affecting the Osage Reservation. The first was the Oklahoma Enabling Act, enacted on June 16, 1906, which described how the Oklahoma Territory and the neighboring Indian Territory could "adopt a constitution and become the State of Oklahoma." See Act of June 16, 1906, ch. 3335, § 1, 34 Stat. 267. "[N]othing contained in the said constitution" would "be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished)." *Ibid.* The state constitutional convention would specifically include two delegates elected by "electors residing in the Osage Indian Reservation," including qualified tribal members. § 2, 34 Stat. 268. Once a constitution was ratified and the State admitted to the Union, "the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof." § 13, 34 Stat. 275; see § 21, 34 Stat. 277 (similar provision). The Act further instructed that the new state constitution "shall constitute the Osage Indian Reservation a separate county, and provide that it shall remain a separate county until the lands in the Osage Indian Reservation are allotted in severalty and until changed by the legislature of Oklahoma." *Ibid.*

The second relevant statute, known as the Osage Allotment Act, was enacted less than two weeks later and "provided for an equal division" of the Osage trust fund and lands among the approximately 2000 tribal members. *McCurdy*, 246 U.S. at 265; see Act of June 28,

1906, ch. 3572, 34 Stat. 539. As to the money, all present and future funds were to be split among the tribal members and held in trust for them by the United States. § 4, 34 Stat. 544.

As to the land, each tribal member was permitted to select three allotments of 160 acres each, and would also receive an equal share of any land left over after all allotments had been selected. Osage Allotment Act § 2, 34 Stat. 540. The allottee would designate one of his three allotments as a "homestead," which would be "inalienable and nontaxable until otherwise provided by Act of Congress." § 2 Fourth, 34 Stat. 541. The other two allotments (plus any extra left-over land given to the tribal member) would be designated "surplus land," and would be inalienable for 25 years and nontaxable for three years, unless the Secretary of the Interior issued a "certificate of competency" to the allottee, thereby permitting earlier sale and taxation. § 2 Fourth & Seventh, 34 Stat. 541, 542. Certain specified tracts were reserved from allotment, including land "for the use and benefit of the Osage Indians, exclusively, for dwelling purposes" for 25 years; land for a boarding school; land for federal government buildings; and land including houses for the Osage chief and the United States interpreter (which were to be sold to those persons individually). § 2 Ninth-Eleventh, 34 Stat. 542-543.

Although the surface rights were allotted, all of the subsurface mineral rights were "reserved to the Osage tribe for a period of 25 years." Osage Allotment Act § 3, 34 Stat. 543. The mineral royalties were to be "distributed to the individual members of said Osage tribe," except for funds taken off the top to run the boarding school "and for other schools on the Osage Indian Reservation"; for operation of the Indian agency; and for an

emergency fund for the Tribe to "be paid out from time to time, upon the requisition of the Osage tribal council, with the approval of the Secretary of the Interior." § 4 Second-Fourth, 34 Stat. 544. The Act stated that after 25 years, "the lands, mineral interest, and moneys, herein provided for and held in trust by the United States," would become the "absolute property of the individual members." § 5, 34 Stat. 544.

c. Oklahoma became a State in 1907. Pet. App. 7a. As required by the Oklahoma Enabling Act, the state constitution provided that the "Osage Indian Reservation with its present boundaries is hereby constituted one county to be know[n] as Osage County." *Ibid.* (quoting Okla. Const. Art. XVII, § 8). That county is today the largest in Oklahoma, encompassing roughly three percent of the State's total land area. *Ibid.* Most of the land in the county is held in fee simple, but certain "limited, scattered parcels" are held in trust by the United States for the Tribe or are allotments that remain under alienation restrictions. *Id.* at 33a. The United States also continues to hold the entire mineral estate in trust, pursuant to post-1906 statutes extending the trust period. See, *e.g.*, Act of Mar. 2, 1929, ch. 493, § 1, 45 Stat. 1478; Act of Oct. 21, 1978, Pub. L. No. 95-496, § 2, 92 Stat. 1660 (extending trust period in perpetuity).

2. a. In 1999, an Osage member who works for the Tribe on trust land, but lives on fee land, within the original boundaries of the Osage Reservation protested the State's taxation of her income. Pet. App. 8a. This Court has held that a tribal member who lives and works on an Indian reservation, or other "Indian country" as defined in 18 U.S.C. 1151, is immune from state income tax unless Congress expressly provides otherwise. See *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114,

123-126 (1993); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 167-173 (1973). The Oklahoma Tax Commission determined, however, that the tribal member's home was not in Indian country. Pet. App. 8a. In the Commission's view, only the trust and restricted lands within Osage County are Indian country, and the State may therefore tax the income of tribal members who live or work elsewhere. *Id.* at 33a.

The Commission's ruling prompted petitioner, the Osage Nation, to file suit in the District Court for the Northern District of Oklahoma against the State, the Commission, and respondent individual Commission members. Pet. App. 8a-9a. Petitioner sought a declaration that (1) the Osage Reservation has not been disestablished or diminished, and (2) tribal members living and working within the Reservation's original boundaries are exempt from state income tax. *Id.* at 8a. It also sought an injunction barring the State from collecting income taxes from such persons. *Ibid.* On an interlocutory appeal, the court of appeals held that the State and the Commission enjoyed sovereign immunity, but permitted the suit to proceed against respondents. *Id.* at 9a; see *Osage Nation* v. *Oklahoma*, 260 Fed. Appx. 13 (10th Cir. 2007), cert. denied, 129 S. Ct. 104 (2008).

b. The district court subsequently granted respondents' motion for summary judgment on the merits. Pet. App. 24a-56a. Applying the framework set forth in *Solem* v. *Bartlett*, 465 U.S. 463, 470-471 (1984), for analyzing whether an Indian reservation has been disestablished (*i.e.*, eliminated entirely) or diminished (*i.e.*, reduced), the court determined that the "language of the 1906 Osage Allotment Act and the surrounding historical circumstances establish Congress' plain intent to terminate the Nation's reservation." Pet. App. 37a.

The district court observed that the Osage Allotment Act "effected the transfer of nearly all Osage tribal lands to its members," Pet. App. 37a; contemplated the sale of most of the non-allotted, reserved lands, *id.* at 38a; and left the tribal government with "few powers to exercise," *id.* at 40a. Although the Osage Allotment Act, and other statutes, referred to the "Osage Indian Reservation" as though it remained in existence, the district court concluded that these references were employed "only to describe a known geographic area." *Ibid.* The court found additional support for its disestablishment conclusion in the Oklahoma Enabling Act and the earlier Oklahoma Organic Act (Act of May 2, 1890, ch. 182, 26 Stat. 81), which in the court's view had both contemplated substantial state jurisdiction over Indian lands in Oklahoma. Pet. App. 40a-44a. Post-1906 congressional sources further "confirm[ed]" to the district court that the reservation had been disestablished. *Id* at 44a. For example, a 1935 Senate Report concerning the Oklahoma Indian Welfare Act, ch. 831, 49 Stat. 1967, stated that "all Indian reservations as such have ceased to exist" in Oklahoma. Pet. App. 44a (emphasis omitted) (quoting S. Rep. No. 1232, 74th Cong., 1st Sess. 6).

On the specific issue of Oklahoma's power to tax the income of tribal members, the district court concluded that "[w]ith respect to Osage lands in Osage County, the Supreme Court long ago recognized the Congressional intent that such lands be subject to state taxation." Pet. App. 50a (citing, *inter alia*, *Choteau* v. *Burnet*, 283 U.S. 691, 695 (1931)). The district court additionally concluded that petitioner's claims were equitably barred. *Id.* at 54a-56a.

c. The court of appeals affirmed. Pet. App. 3a-23a. It concluded that the reservation had been disestab-

lished, and therefore perceived no need to more specifically address the State's taxation authority or to address the district court's laches determination. *Id* at 22a-23a.

The court of appeals stated that it would address the disestablishment question through "the three-part test summarized in *Solem*." Pet. App. 10a. It explained that the *Solem* test seeks to determine "Congress's intent at the time of the relevant statute" by examining "(1) explicit statutory language"; "(2) surrounding circumstances"; and, to a lesser extent, "(3) subsequent events, including congressional action and the demographic history of the opened lands." *Id.* at 11a (internal quotation marks and citation omitted). The court noted, quoting *Solem*, that it would be proper to "infer diminishment * * * despite statutory language that would otherwise suggest unchanged reservation boundaries when events surrounding passage of the act 'unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.'" *Ibid.* (brackets omitted) (quoting 465 U.S. at 471) . The court of appeals recognized that "there is a presumption in favor of the continued existence of a reservation"; that disestablishment "will not be lightly inferred"; and that "Congress's intent to terminate must be clearly expressed." *Id* at 10a (citing *Solem*, 465 U.S. at 470, 472, and *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)).

On the first *Solem* factor, the court of appeals concluded that "the operative language of the statute does not unambiguously suggest diminishment or disestablishment of the Osage reservation." Pet. App. 14a. The court observed that the Osage Allotment Act does not contain language that this Court in other contexts has found to weigh in favor of disestablishment, and does

contain some factors that this Court in other contexts has found to weigh against disestablishment. *Id.* at 13a-14a. For example, the Act did not immediately open up the land to non-Indian settlers, some lands were retained for tribal purposes, and the mineral estate was reserved for the Tribe in trust. *Ibid.*

On the second *Solem* factor, the court of appeals concluded that the "manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished." Pet. App. 15a. The court reasoned that the Act was passed at a time when the United States was seeking dissolution of Indian reservations, particularly in Oklahoma, and that the Osage were aware of this pressure and recognized that the allotment process would result in the loss of tribal land. *Id.* at 15a-16a; see *id.* at 17a ("The legislative history and the negotiation process make clear that all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act."). The court also examined the views of several historians whose research supported the conclusion that the Osage Reservation had been disestablished. *Id.* at 17a-18a. The court of appeals additionally observed that petitioner had presented little, if any, historical evidence to the contrary. *Id.* at 18a.

As to the third *Solem* factor—subsequent events—the court of appeals concluded that the "uncontested facts support disestablishment." Pet. App. 20a. The court cited annual reports from the Superintendent of the Osage Indian Agency to the Commissioner of Indian Affairs in 1916, 1919, and 1920 indicating that the State had primary criminal jurisdiction in the area. *Id.* at 20a-21a. The court also relied on "uncontested popula-

tion demographics" showing a "dramatic shift in the population of Osage County" towards non-Indian residency and land ownership "immediately following the passage of the Osage Allotment Act." *Id.* at 21a-22a.

DISCUSSION

This Court's review of this case is not warranted. Neither the legal framework applied by the court of appeals nor the result it reached conflicts with any decision of this Court or another court of appeals. The unique statutory and historical circumstances of Oklahoma tribes in general, and the Osage Nation in particular, make this case an especially poor vehicle for addressing issues of reservation disestablishment, which are inherently statute-specific and fact-bound in any event. The reservation question, moreover, need not be addressed in this case because the lower courts reached the correct conclusion on the ultimate question of personal-income-tax immunity for Osage members living on fee land in Osage County. Certiorari should accordingly be denied.

1. Contrary to petitioner's contention (Pet. 12-15), the court of appeals applied the proper analytical framework for determining whether a reservation has been disestablished or diminished. The court of appeals correctly recognized that "there is a presumption in favor of the continued existence of a reservation," which requires that any contrary intent of Congress "must be clearly expressed." Pet. App. 10a; see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (intent to diminish must be "clear and plain") (citation omitted); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984) (intent to diminish must be "clearly evince[d]"); *DeCoteau* v. *District County Court*, 420 U.S. 425, 444 (1975) (intent to disestablish must be "clear"). The court of ap-

peals also correctly recognized that the inquiry into Congress's intent encompasses the relevant statutory language; the legislative history and other contemporaneous surrounding circumstances; and, as a subsidiary consideration, subsequent events. Pet. App. 10a-12a; see, *e.g.*, *Yankton Sioux Tribe*, 522 U.S. at 343-344; *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Solem*, 465 U.S. at 470-471. The court of appeals then proceeded to examine those sources: it found no unambiguous termination language in the Osage Allotment Act or Oklahoma Enabling Act, Pet. App. 12a-14a; but it found "clear congressional intent" of disestablishment in the "manner in which the Osage Allotment Act was negotiated," *id.* at 14a-19a; and it determined that subsequent events further supported a disestablishment conclusion, *id.* at 19a-23a. Any criticism of the court of appeals' opinion would be directed at its circumstances-specific reasoning, not the legal framework it applied.

Petitioner suggests (Pet. 13-14, 18) that the court of appeals should have ended its analysis, and entered judgment in petitioner's favor, once it determined that the statutory text did not unambiguously support disestablishment. That suggestion is misplaced. The "most probative evidence" of diminishment or disestablishment "is, of course, the statutory text," *Yankton Sioux Tribe*, 522 U.S. at 344 (citation omitted), and "the statutory text must establish an express congressional purpose to diminish" before a court may so find, *Hagen*, 510 U.S. at 411 (internal quotation marks, brackets, and citation omitted). But, notwithstanding petitioner's suggestions to the contrary (Pet. 13-14; Reply Br. 3-4), the Court has rejected the application of a "clear-statement rule" that would require Congress to employ "any particular form of words" to express its purpose. *Ibid.*; compare, *e.g.*,

Yankton Sioux Tribe, 522 U.S. at 351 ("Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished."), with, *e.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in the statutory text.").

Rather, courts should consider, as an aid to interpreting ambiguous text, "'the historical context surrounding the passage of the surplus land Acts,' and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *Hagen*, 510 U.S. at 411). In particular, as the court of appeals observed (Pet. App. 10a), this Court has explained that "[w]hen events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged." *Solem*, 465 U.S. at 471; see *id.* at 469 n.10 (discussing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977)).

2. Petitioner asserts (Pet. 7-12; Reply Br. 3-7) that the lower courts are in conflict in reservation-disestablishment cases as to "whether, under a congressional clear statement rule, external indicia" of the sort considered by the court of appeals here "can predomi-

nate over statutory text and history." Reply Br. 4 (emphasis omitted). That assertion is mistaken.

As a threshold matter, petitioner's characterization of the asserted conflict misdescribes both the governing standard and the manner in which the court of appeals here applied it. First, as just discussed, although Congress's "intent" to modify reservation boundaries "must be 'clear and plain,'" *Yankton Sioux Tribe*, 522 U.S. at 343 (citation omitted), the Court has declined to employ the sort of textual "clear statement rule" that petitioner posits. See pp. 10-11, *supra*. Second, petitioner's suggestion that the court of appeals in this case permitted "external indicia" to "predominate over statutory text and history" is inaccurate. Although the court of appeals' analysis is relatively brief, it describes a methodology in which contemporaneous surrounding circumstances, *including* statutory history, are employed to *interpret* otherwise ambiguous text. The court noted that certain textual factors might "weigh[] in favor of continued reservation status," but it found the text overall to be ambiguous. See Pet. App. 13a-14a; *id.* at 14a ("[T]he operative language of the statute does not unambiguously suggest diminishment or disestablishment."). Observing that "[i]f the statute is ambiguous, we turn to the circumstances surrounding the passage of the act," *ibid.*, the court proceeded to conclude that the "manner in which the Osage Allotment Act was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished," *id.* at 15a; see *id.* at 15a-16a.

In any event, petitioner errs in contending (Reply Br. 5) that "the law of the Second, Eighth, and Ninth Circuits and Wyoming Supreme Court" would reject the court of appeals' analytical framework in this case. Any

differences in the reasoning and results of the cases petitioner cites do not demonstrate a fundamental methodological conflict, but instead reflect the unique statutes and different factual records before each court.

The "effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469). As in this case, each of the aforementioned courts in the cases cited by petitioner looked first to the statutory language, and then to the surrounding circumstances, in an effort to discern congressional intent. See *Yankton Sioux Tribe* v. *Podhradsky*, 606 F.3d 994, 1004-1006 (8th Cir. 2010), petitions for cert. pending, Nos. 10-929, 10-931 & 10-932 (filed Jan. 18, 2011), No. 10-1058 (filed Feb. 22, 2011); *Oneida Indian Nation* v. *City of Sherrill*, 337 F.3d 139, 161-165 (2d Cir. 2003), rev'd on other grounds, 544 U.S. 197 (2005); *United States* v. *Webb*, 219 F.3d 1127, 1134-1139 (9th Cir. 2000), cert. denied, 531 U.S. 1200 (2001); *Yellowbear* v. *State*, 174 P.3d 1270, 1282-1284 (Wyo. 2008). None of these cases held, as petitioner would have it, that surrounding circumstances are invariably irrelevant in the absence of a clear textual statement. Rather, the result in each case depended upon an examination of the specific surrounding circumstances at issue. See *Podhradsky*, 606 F.3d at 1005 (concluding that "exhaustive analysis of the historical materials surrounding the Tribe's agreement with the federal government and the 1894 ratification of that agreement, as well as the subsequent history," supported continuation of reservation); *Oneida Indian Nation*, 337 F.3d at 162 & n.20 (concluding that "certain legislative and administrative documents," which "indicate[d] little if anything about Congress's intent in 1838" at the time of the relevant treaty, and

were unpersuasive for other reasons, did not "'unequivocally reveal' the intention necessary to demonstrate disestablishment"); *Webb*, 219 F.3d at 1135-1136 (concluding that "[a]s to the circumstances surrounding the 1893 Agreement, a review of the pertinent evidence discloses nothing to impeach the district court's findings" favoring continuation of the reservation); *Yellowbear*, 174 P.3d at 1282-1283 (concluding that examination "in great detail" of the "events and circumstances pertaining to" the relevant Act supported diminishment).

It is to be expected that courts examining different statutes and different surrounding circumstances would sometimes find "unequivocal" evidence of disestablishment or diminishment, *Yankton Sioux Tribe*, 522 U.S. at 351, and sometimes would not. See *Solem*, 465 U.S. at 469 ("[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not.") (citations omitted). The Court's precedents "have established a fairly clean analytical structure" for disestablishment and diminishment cases, *Hagen*, 510 U.S. at 410-411 (citation omitted), but the application of that analytical structure is by necessity heavily dependent on the circumstances of the particular reservation, and there is a wide variety of potential factual scenarios. Case-specific application of settled legal standards, focusing on distinct statutory provisions and historical circumstances, does not merit this Court's review, see Sup. Ct. R. 10, and granting certiorari in a case like this would be unlikely to provide any useful guidance for future disestablishment or diminishment cases.

Petitioner relies (*e.g.*, Reply Br. 1) on the grant of certiorari in *Madison County* v. *Oneida Indian Nation*, 131 S. Ct. 704 (2011) (per curiam), for the proposition that the Court has recognized a need to provide further

guidance on reservation-disestablishment issues. The Court's disposition of that case in fact indicates the opposite. The case presented two questions, only the second of which involved disestablishment. *Ibid.* The Court dismissed the case before argument when the primary question was mooted, notwithstanding the petitioner's argument that "there are many other questions to be resolved in this litigation, including the second question presented to this Court (whether the ancient Oneida reservation in New York was disestablished or diminished)." Letter from David M. Schraver, Counsel of Record for Petitioners, to Hon. William K. Suter, Clerk of Court 3, No. 10-72 (Dec. 1, 2010); see *Madison County*, 131 S. Ct. at 704. The Court thus concluded that the disestablishment issue in *Madison County* did not independently warrant review. The disestablishment issue in this case similarly does not warrant review.

3. This case, in any event, would be a particularly poor vehicle for addressing disestablishment and diminishment questions. It has long been recognized that Oklahoma tribes have an anomalous statutory and historical backdrop that legally distinguishes them in various ways from tribes in other regions. See, *e.g.*, 1 Felix S. Cohen, *Handbook of Federal Indian Law* 425 (1st ed. 1942) (stating, in chapter on "Special Laws Relating to Oklahoma," that in some respects, "Oklahoma Indians, or certain groups thereof, are excluded from the scope of * * * statutes and legal principles" generally applicable to other Indians). And even within the singular context of Oklahoma, the Osage Nation presents a special case. See, *e.g.*, *id.* at 446-455 (section on "Special laws governing Osage Tribe," including subsection on distinctive allotment laws).

Although Congress has disestablished the formal reservations of other Oklahoma tribes, Gov't Br. at 17-20, *Murphy* v. *Oklahoma*, 551 U.S. 1102 (2007) (No. 05-10787), it is unclear whether Congress went so far as to disestablish the Osage Reservation. As the court of appeals recognized, aspects of the Osage Allotment Act—some set-asides of lands for several tribal purposes, virtually exclusive initial allocation of land to tribal members, and retention of mineral rights for the Tribe—can imply a continuing reservation. Pet. App. 13a-14a; see *Solem*, 465 U.S. at 474. Additional factors—including the present-tense references to the Reservation in the Osage Allotment Act and the Oklahoma Enabling Act, see, *e.g.*, Oklahoma Enabling Act § 2, 34 Stat. 268; Osage Allotment Act § 4 Third, 34 Stat. 544—may point in a similar direction.

There is no need, however, to resolve the disestablishment question in this case. Even if Congress did not disestablish the Osage Reservation, its sui generis treatment of the Osage clearly contemplated a unique degree of state authority within the original Reservation boundaries. That authority includes the assessment of the personal income taxes at issue here.

a. Congress expressly incorporated the Osage into the political structure of the emerging State of Oklahoma in a manner that anticipated at least some state authority over tribal members and their lands. Congress specifically provided for Osage members to vote for delegates to the state constitutional convention, who would participate in writing the laws that would govern the State. Oklahoma Enabling Act § 2, 34 Stat. 268. Congress additionally required that the Reservation be designated its own county, thereby encapsulating it as a single political subdivision of the State and presumably

intending to vest it with some measure of local governmental authority. And the Act left the Oklahoma legislature free to alter the county boundaries once "the lands in the Osage Indian Reservation are allotted in severalty," § 21, 34 Stat. 277, thus identifying the replacement of tribal ownership with individual ownership—to be followed by state taxation and alienability of two-thirds of the allotments, Osage Allotment Act § 2 Seventh, 34 Stat. 542—as also triggering additional state authority, at least to the extent of allowing the State to redraw political boundaries. These statutory provisions for the Osage Tribe are unique, and serve to distinguish that Tribe from other tribes involved in prior disestablishment cases.

In addition, provisions of the Osage Allotment Act and the Oklahoma Enabling Act expressly authorized certain state authority within the original Reservation boundaries. As just noted, the Osage Allotment Act authorized state taxation of surplus allotments three years after the passage of the Act. It also specified that state law would generally govern tribal-member inheritance of "the lands, moneys, and mineral interests, herein provided for," and that "public highways or roads" of certain description could be "established without any compensation therefor." §§ 6, 10, 34 Stat. 545. The Oklahoma Enabling Act banned alcohol manufacture and sale on Osage land only for 21 years, after which state regulation would be permitted. § 3 Second, 34 Stat. 269.

More generally, the Oklahoma Enabling Act did not assert the same federal jurisdictional authority over Indian lands in Oklahoma as it did over Indian lands in another potential State enabled by the same statute, which would have included the Arizona and New Mexico Territories. See generally Oklahoma Enabling Act

§§ 23-41, 34 Stat. 278-285 (enabling residents of those territories, had they so chosen, to join the Union as a single State of Arizona). As to the latter State, Congress provided that "all lands lying within [its] limits owned or held by any Indian or Indian tribes * * * shall remain under the absolute jurisdiction and control of the Congress of the United States." § 25 Second, 34 Stat. 279 (requiring potential Arizona constitution to "forever disclaim right and title" to public and Indian lands and specifying that Congress would retain jurisdiction over both). Congress enacted no such provision for Indian lands in Oklahoma. See § 3 Third, 34 Stat. 270 (requiring potential Oklahoma constitution to "forever disclaim all right and title" to public and Indian lands, but specifying only that Congress would retain jurisdiction over public land). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets and citation omitted).

The historical record in this case (which is not well-developed) moreover contains no clear evidence that the federal government has exercised meaningful criminal jurisdiction over unrestricted fee lands in Osage County. The United States has long asserted, and the Court has long recognized, federal criminal jurisdiction over trust and restricted lands within the original boundaries of the Osage Reservation. See *United States* v. *Ramsey*, 271 U.S. 467 (1926) (upholding federal criminal jurisdiction on restricted Osage allotments). Fee lands on an Indian reservation would generally fall under federal criminal superintendence as well. See 18 U.S.C. 1151(a),

1152, 1153; see, *e.g.*, *Donnelly* v. *United States*, 228 U.S. 243, 253-254 & n.2 (1913); see also Act of Aug. 15, 1953, § 1, 67 Stat. 588 (18 U.S.C. 1162) (providing specific mechanism, not applicable here, for state criminal jurisdiction over Indian country). But the court of appeals observed that early reports from the local federal Superintendent to the Commissioner of Indian Affairs contemplated state criminal jurisdiction in Osage County, Pet. App. 20a-21a, and *Ramsey*'s focus on whether a restricted Osage allotment qualified as Indian country for purposes of federal criminal jurisdiction would have been too narrow if federal criminal jurisdiction had been understood to extend throughout Osage County. And this Office has been informed that the federal government currently focuses its prosecutorial efforts only on trust and restricted lands. See 18 U.S.C. 1151 (classifying such lands as "Indian country").

b. All of this is not to say that Osage sovereignty over lands within the original 1872 reservation has been entirely displaced. It is undisputed, for example, that the remaining restricted allotments and trust lands are "Indian country" under federal law, 18 U.S.C. 1151, and the Osage Nation thus retains some sovereignty (including tax immunity for tribal members) there. See *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993). Existing precedents, however, are inconsistent with petitioner's contention that Osage members living on fee land within original Reservation boundaries enjoy immunity from state personal-income tax.

The Court has long recognized that the special treatment of certain Oklahoma tribes allows for an extraordinary degree of state taxation that may be impermissible elsewhere. See, *e.g.*, *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 603 (1943) (observing, in case in-

volving other Oklahoma tribes, that the "underlying principles" of other Indian taxation decisions "do not fit the situation of the Oklahoma Indians"). Even within Oklahoma, the treatment of the Osage has been particularly distinctive. With limited exception, see *McCurdy* v. *United States*, 264 U.S. 484 (1924), the Court has consistently upheld state taxation of tribal members. See, *e.g.*, *West* v. *Oklahoma Tax Comm'n*, 334 U.S. 717 (1948) (upholding application of state inheritance tax to Osage member's trust fund, including interest in mineral rights). This has included state taxation of tribal members' personal income.

In *Choteau* v. *Burnet*, 283 U.S. 691 (1931), the Court held that an Osage member was required to pay federal income tax on his income from the Tribe's mineral leases. The Court determined that the member's "status as an Indian" did not exempt him from the tax, observing that "[n]o provision in any of the treaties referred to by counsel has any bearing upon the question of the liability of an individual Indian to pay tax upon income derived by him from his own property." *Id.* at 694. Examining the Osage Allotment Act, the Court reasoned that once petitioner had received a certificate of competency enabling him to sell his non-homestead allotments, he became "taxable" upon those lands. *Id.* at 695. "It is evident," the Court stated, "that as respects his property other than his homestead his status is not different from that of any citizen of the United States." *Ibid*

In *Leahy* v. *State Treasurer*, 297 U.S. 420 (1936), the Court applied that same logic to state taxation. The petitioner there, an Osage member who had received a certificate of competency, challenged Oklahoma's taxation on his mineral-lease income. *Id.* at 421. The Court disposed of the substance of the challenge in a single three-

sentence paragraph. It observed that the "facts are substantially the same as those presented in" *Choteau*; that the "applicable statutes and decisions are discussed there"; and that because the petitioner "was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the State." *Ibid.*

Petitioner argues (Reply Br. 11) that the results in *Choteau* and *Leahy* were "mandated by the" Osage Allotment Act, "which authorized taxation of allottees who received certificates of competency," and that those cases are therefore "inapplicable to [the] descendants" of the original allottees. But, contrary to petitioner's contention, there is nothing in the Osage Allotment Act that specifically authorized taxation of original allottees who received certificates of competency. The case on which petitioner relies—*County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 262-263 (1992)—concerned the *General* Allotment Act, not the *Osage* Allotment Act. The General Allotment Act does contain a provision expressly applying state law to original allottees, and this Court held in *County of Yakima* that the provision does not authorize personal taxation of the descendants of those original allottees. See 25 U.S.C. 349 (providing that once allotments are held in fee, "then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside"); *County of Yakima*, 502 U.S. at 262 (rejecting construction "that would extend the State's *in personam* jurisdiction beyond the section's literal coverage ('each and every *allottee*') to include *subsequent* Indian owners (through grant or devise) of the allotted parcels").

The Osage, however, were expressly excepted from the General Allotment Act, ch. 119, § 8, 24 Stat. 391, and the Osage Allotment Act contains no similar provision. See § 2 Seventh, 34 Stat. 542 (discussing taxation of land rather than taxation of allotees); cf. *United States* v. *Mason*, 412 U.S. 391, 397 (1973) (observing that cases arising "under the General Allotment Act rather than the Osage Allotment Act" were "of questionable relevance" in a case concerning the Osage). The Court's decisions in *Leahy* and *Choteau* accordingly did not rest on any legal principle applicable only to original allottees, and they are consistent with the Court's view that the peculiar circumstances of the Osage justify a distinct approach to the question of state taxation.

The lower courts therefore correctly denied petitioner's request for declaratory and injunctive relief regarding tax immunity. For that reason, and in light of the unique circumstances of the Osage Tribe and its reservation, the nature of the court of appeals' ruling, and the absence of a conflict in the lower courts, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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